

Juridical Space: Female Witnesses in Canon Law

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The law of evidence presents thorny, often intractable, problems in every legal system,¹ and medieval canon law was no exception to that general rule. Gratian and his successors got only limited help from their Roman law texts when they tried to devise rules concerning the admissibility of oral testimony, depositions, documents, and physical data, or the evaluation of the evidence that these sources furnished, since ancient Roman jurists had remarkably little to say about these matters.² Medieval canonists had, nonetheless, begun to devise rules of evidence long before the mid-twelfth century, when Gratian systematically assembled and analyzed the material available from a wide range of earlier sources.³ His work laid the foundation for the development of a hierarchy of evidence and of doctrines for its evaluation, which was one of the major achievements of the classical period of canon law and lies at the basis of much of the law of evidence in subsequent western legal systems, including our own.⁴

My purpose here is to examine female space in the law courts as defined by one element in the law of evidence that the canonists devised during the twelfth and thirteenth centuries, namely, the way in which they dealt with testimony given by female witnesses.⁵ I first look at the doctrine on this matter as it emerged in the schools and then compare the academic teachings on this matter with the practice of church courts in England, where the surviving evidence from the Courts Christian is relatively abundant and often more readily accessible than church court records from the continent.⁶

¹R. C. Van Caenegem, "The Law of Evidence in the Twelfth Century: European Perspective and Intellectual Background," in *Proceedings of the Second International Congress of Medieval Canon Law*, ed. S. Kuttner and J. J. Ryan, Monumenta iuris canonici, Subsidia (Vatican City, 1965), 310.

²W. W. Buckland and A. D. McNair, *Roman Law and Common Law: A Comparison in Outline*, 2nd ed., rev. by F. H. Lawson (Cambridge, 1965), 402.

³W. Litewski, "Les textes procéduraux du droit de Justinien dans le Décret de Gratien," *Studia Gratiana* 9 (1966), 78–84.

⁴J.-P. Lévy, "Le problème de la preuve dans les droits savants," *Recueil de la Société Jean Bodin* 17 (1965), 139–67; J. Kejř, "Pojem soudního důkazů ve středověký právních naukách" [The notion of evidence in medieval legal documents], *Stát a právo* 13 (1967), 187 (Eng. summary).

⁵I am greatly indebted throughout this paper to Dr. Giovanni Minnucci's fundamental research on the whole topic of the procedural situation of women in the canonists; see especially his *La capacità processuale della donna nel pensiero canonistico classico*, 2 vols., Quaderni di "Studi Senesi" 68 and 79 (1989–94), and *La capacità processuale della donna nel pensiero canonistico classico: Le scuole Franco-Renana ed Anglo-Normana al tempo di Ugucione da Pisa* (Siena, 1990).

⁶Many of the surviving records are analyzed in *The Records of the Medieval Ecclesiastical Courts*, ed. C. Donahue, Jr., 2 vols., Comparative Studies in Continental and Anglo-American Legal History 6–7 (Berlin, 1989–94).

Gratian dealt with the eligibility of witnesses to testify in several passages of his *Decretum*.⁷ In one of them he cited authorities to the effect that known enemies of a defendant should be barred from giving testimony against him, as also should persons known to be immoral or to have unorthodox religious opinions.⁸ In another passage he reported the opinion of Pseudo-Calixtus to the effect that blood relatives of the accuser or members of his household should also be rejected as witnesses against a defendant.⁹ Gratian drew upon Roman law authorities in three further passages that center specifically on the testimony of women. These authorities tell us that in principle women were permitted to testify in court, although their right to bring accusations was limited to situations involving the deaths of their parents, their children, their patrons, or a patron's sons, daughters, or grandchildren.¹⁰ Women could also appear in criminal proceedings concerning the wills of their parents' freedmen or to avenge the deaths of any of their own close kin. They were further permitted to testify in treason cases¹¹ and in cases involving simony.¹² From these passages Gratian concluded that the laws generally permitted women to testify and that they should not be barred from giving testimony in civil matters unless some enactment specifically forbade them to do so.¹³ Bringing criminal accusations, Gratian continued, was another matter entirely. Since the laws permitted women to appear as accusers in a few specific situations, he argued that women were not entitled to appear as accusers in other criminal matters, including fornication, which was the specific situation at issue in this passage of the *Decretum*.¹⁴ In a different context, however, Gratian cited a patristic passage that on the face of it seemed to bar the courts from hearing the testimony of female witnesses at all.¹⁵ Academic commentators were quick to point out

⁷See generally F. Liotta, "Il testimone nel Decreto di Graziano," in *Proceedings of the Fourth International Congress of Medieval Canon Law*, ed. S. Kuttner, Monumenta iuris canonici, Subsidia 5 (Vatican City, 1976), 81–93.

⁸C. 3 q. 5 c. 4: "Suspectos aut inimicos, aut facile litigantes, et eos, qui non sunt bonae conuersationis, aut quorum uita est accusabilis, et qui rectam non tenent et docent fidem, accusatores esse et testes antecessores nostri apostoli prohibuerunt et nos eorum auctoritate submouemus atque temporibus futuris excludimus." This is a fragment from Pseudo-Isidore; see *Decretales Pseudo-Isidorianae et Capitula Angilramni*, ed. P. Hinschius (Leipzig, 1863; repr. Aalen, 1963), 149. For the romano-canonical citation system employed here, see my *Medieval Canon Law* (London, 1995), 190–205.

⁹C. 3 q. 5 c. 12: "Accusatores uel testes suspecti non recipiantur, nec familiares uel de domo prodeuntes, nec etiam consanguinei accusatoris aduersus extraneos testimonium dicant, quia propinquitatis et familiaritatis ac dominationis affectio ueritatem impedire solet. Amor carnalis et timor atque auaritia plerumque sensus hebetant humanos, et peruertunt opiniones, ut questum pietatem putent, et pecuniam quasi mercedem prudentiae"; also from Pseudo-Isidore, *Decretales*, ed. Hinschius, 141.

¹⁰C. 15 q. 3 c. 2, taken from CIC, *Dig* 22.5.18 and 48.2.1.

¹¹C. 15 q. 3 c. 3, a pastiche of quotations from CIC, *Dig* 48.2.2, *CI* 9.1.4, and *Dig* 48.4.8.

¹²C. 15 q. 3 c. 4, taken from CIC, *CI* 1.3.30.5.

¹³French royal law ultimately adopted this position as well; see A. Gouron, "Ordonnances des rois de France et droits savants (XIIIe–XVe siècles)," *CRAI* (1991), 851–65 at 853.

¹⁴C. 15 q. 3 d.p.c. 4 § 2: "Nec quisquam distinguere querat, ad aliorum, non ad sacerdotum accusationem in hoc casu symoniae mulieres esse admittendas. Cum enim generaliter legibus hoc eis permissum inueniatur, nisi quis specialiter aliqua lege hoc prohibitum ostenderit, eius distinctio locum non habebit. Verum, cum contra regulas generales quedam crimina specialiter excepta sint, in quibus mulieri accusare permittitur, inter que fornicatio non numeratur, patet, quod huius accusatio dupliciter infirmatur, et quia fornicationis crimen intendit, et quia, dum de se confitetur, super alienum crimen ei credi non oportet."

¹⁵C. 33 q. 5 c. 17: "Mulierem constat subiectam dominio uiri esse, et nullam auctoritatem habere; nec docere potest, nec testis esse, nec iudicare." Although Gratian attributed this passage to St. Ambrose, the author was in fact St. Augustine: *Liber quaestionum Veteris et Novi Testamenti*, q. 45, in PL 35:2247.

the discrepancy between this and other passages in the *Decretum* and to explain away the inconsistency with nimble distinctions.¹⁶

Elsewhere Gratian dealt with a few special situations in which women's testimony was clearly admissible. These included matrimonial litigation in which the husband was alleged to be impotent. Here his wife's testimony was obviously essential.¹⁷ Similarly when consanguinity was at issue in matrimonial cases the testimony of family members, including women, was obviously likely to comprise a significant part of the evidence on the matter and accordingly was allowed,¹⁸ even though Gratian maintained that as a general rule members of a party's household were ineligible to testify.¹⁹

Gratian further admitted certain situations where all persons within certain classes, regardless of gender, were unacceptable as witnesses in litigation. These included persons adjudged disreputable (*infames*),²⁰ excommunicates, heretics, pagans, Jews,²¹ minors,²² and the insane.²³

While teachers in the schools of canon law generally accepted the positions on the admissibility of witnesses that they found in Gratian's text and sought to explicate his reasoning on this topic more fully, a few of them took issue with some of his conclusions. Thus, for example, Stephen of Tournai (1135–1203) opined that Gratian had either erred or wandered from the point in his discussion of the acceptability of women as witnesses in treason and simony cases.²⁴ Similarly, Master Rolandus (fl. late 1150s) adopted a rather

¹⁶E.g., Johannes Teutonicus, *Glossa ordinaria* to C. 33 q. 5 c. 17 v. *nec testis*: "In causa criminali, nisi in illis casibus in quibus infames admittuntur, nec in testamento, Insti. De testa. § testes [Inst. 2.10.6], nec contra clericos in causa criminali, quia non potest esse quod ipsi sunt, supra 2 q. 7 ipsi Apostoli [C. 2 q. 7 c. 38], nec etiam contra laicos, ut no. 16 quaest. 3 De crimine [C. 15 q. 3 c. 1]." Here and elsewhere I cite the canonistic *glos. ord.* from the printed edition of the *Corpus iuris canonici* (Venice, 1605).

¹⁷C. 27 q. 2 c. 29, ascribed to Pope Gregory I, but actually from a 9th-century letter of Hrabanus Maurus: "Quod autem interrogasti me de his, qui matrimonio iuncti sunt, et nubere non possunt, si ille aliam, uel illa alium possit accipere, de quibus scriptum est: Vir et mulier, si se coniunxerint, et postea dixerit mulier de uiro, quod non possit coire cum illa, si potest probare per uerum iudicium, quod uerum sit, accipiat alium." See also my "Impotence, Frigidity and Marital Nullity in the Decretists and the Early Decretalists," in *Proceedings of the Seventh International Congress of Medieval Canon Law*, ed. P. Linehan, Monumenta iuris canonici, Subsidia 8 (Vatican City, 1988), 407–23, also reprinted with original pagination in *Sex, Law and Marriage in the Middle Ages* (Aldershot, 1993).

¹⁸C. 35 q. 6 c. 2 § 1: "Videtur nobis . . . Quod autem parentes, fratres et cognati utriusque sexus in testificationem suorum ad matrimonium coniungendum uel dirimendum admittantur, tam antiqua consuetudine quam legibus approbatur. Ideo enim maxime parentes, et, si defuerint parentes, proximiores admittuntur, quoniam unusquisque suam genalogiam cum testibus et chartis, tum etiam ex recitatione maiorum scire laborat." See also c. 3.

¹⁹C. 3 q. 5 pr., d.p.c. 14 and d.p.c. 15, relying in part on CIC, *CI* 3.1.16; cf. *Dig* 22.5.4.

²⁰C. 3 q. 4 c. 11; Pseudo-Isidore, *Decretales*, ed. Hinschius, 211–12; cf. also Paulus, *Sententiae* 1.2.1, in *Collectio librorum iuris anteiusinianiani in usum scholarum*, ed. P. Krueger, T. Mommsen, and W. Studemund, 3 vols. (Berlin, 1878–90), II, 49, and also E. Levy, *Pauli Sententiae: A Palingenesia of the Opening Titles as a Specimen of Research in West Roman Vulgar Law* (Ithaca, N.Y., 1945; repr. New York, 1969), 66–71.

²¹C. 4 q. 1 c. 1.

²²C. 4 q. 3 c. 1.

²³C. 3 q. 7 d.p.c. 1: "Tria sunt, quibus aliqui impediuntur ne iudices fiant: Natura, ut surdus, mutus et perpetuo furiosus, et inpubes, quia iudicio carent. Lege, qui senatu motus est. Moribus, feminae et serui, non quia non habent iudicium, sed quia receptum est ut ciuilibus non fungantur offitiis"; cf. CIC, *Dig* 5.1.12.2 and 5.1.39.

²⁴Stephen of Tournai, *Summa* to C. 15 q. 3 d.p.c. 4, ed. J. F. von Schulte (Giessen, 1891; repr. Aalen, 1965), 221.

more restrictive view than Gratian's of the capacity of women to testify against priests,²⁵ while both Stephen of Tournai and the anonymous author of the *Summa Parisiensis* (ca. 1160) suggested that the vexed question of the credibility of witnesses, either men or women, who belonged to the household of one of the litigants required a rather more nuanced and flexible treatment than Gratian had given it.²⁶ The *Summa Parisiensis* maintained that judges ought to evaluate the evidence of household witnesses on the basis of their individual credibility rather than their status, a position that Rufinus (d. 1192) and the author of the *Summa Coloniensis* (ca. 1169) adopted and developed in greater detail.²⁷

Twelfth-century decretists, or commentators on the *Decretum*, elaborated some additional points concerning the eligibility of witnesses that Gratian's book passed over lightly. One point, vital to the due process doctrines that canonists were developing during this period, barred known enemies, male or female, of a litigant from giving evidence.²⁸

Testimony based on hearsay constituted another difficult issue in the law of evidence. Gratian at one point drew the conclusion from his authorities that witnesses should be permitted to testify only to matters of which they had direct knowledge, that is, things they had personally seen and heard.²⁹ The decretists pointed out, however, that this contradicted a later passage in which Gratian's authorities allowed hearsay evidence to be given in matrimonial cases where consanguinity between the spouses was alleged as grounds for a declaration of nullity. Consanguinity, they concluded, must, in its very nature, constitute an exception to the general rule against hearsay, since it was highly unlikely that parents, grandparents, great-grandparents, great-aunts and uncles, or other remote relatives could be available to testify to relationships that were rooted in the distant past.³⁰ Here the testimony of the fathers, mothers, and other close relatives, whether male or female, was essential, and it would be unreasonable, indeed impossible in most situations, not to accept their evidence on events that they knew of only from hearsay. This was an especially acute problem prior to 1215: up to that time canon law mandated a seven-degree rule, which prohibited valid marriages between persons related within seven degrees of blood relationship.³¹ That rule proscribed marriages within an enormous range of blood relationships. A Christian was legally barred from marrying any person descended from his or her great-great-great-great-great-grandfather, a prohibited group that could easily include thousands, or even tens of thousands, of persons.³² Securing reliable evidence concerning such an enormous span of relationships

²⁵Rolandus, *Summa* to C. 15 q. 3, ed. F. Thaner (Innsbruck, 1874), 33–34.

²⁶Stephen of Tournai, *Summa* to C. 3 q. 5 pr., ed. Schulte, 195; *Summa Parisiensis* to C. 3 q. 5 pr., ed. T. P. McLaughlin (Toronto, 1952), 119.

²⁷Rufinus, *Summa* to C. 3 q. 5 pr., ed. H. Singer (Paderborn, 1902; repr. Aalen, 1963), 266; *Summa 'Elegantius in iure diuino' seu Coloniensis* 6.82–83, ed. G. Fransen and S. Kuttner, *Monumenta iuris canonici, Corpus glossatorum*, vol. I.1–4 (New York-Vatican City, 1969–90), 2:142.

²⁸*Summa Parisiensis* to C. 3 q. 5 pr., v. *quia vero testes*, ed. McLaughlin, 119; *Summa Coloniensis* 6.81, ed. Fransen and Kuttner, 2:141.

²⁹C. 3 l. 9 c. 15, d.p.c. 15, and c. 16; Stephen of Tournai, *Summa* to C. 3 q. 9 c. 15, ed. Schulte, 198; and *Summa Parisiensis* to C. 3 q. 9 d.p.c. 15, ed. McLaughlin, 123.

³⁰Rolandus, *Summa* to C. 35 q. 6 c. 5, ed. Thaner, 230–31; Rufinus, *Summa* to C. 35 q. 6 pr. v. *accusantibus vel testificantibus*, ed. Singer, 528–29.

³¹C. 30 q. 1 d.a.c. 1; C. 35 q. 1 d.p.c. 1; C. 35 q. 2 & 3 d.a.c. 1, d.p.c. 21, and d.p.c. 22.

³²For further details, see J. A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* (Chicago, 1987), 140–41, 191–93, 355–57. As Peter Landau recently pointed out, the number of persons with whom a given man or woman could not legally contract marriage could easily amount to as many as 16,129 relatives within seven

demanded a detailed knowledge of the marital history and genealogy of the families involved, much of which necessarily must depend upon evidence that witnesses could only have gleaned from others, whether through family oral traditions or in some cases from written genealogical records.³³ Since women were often the repositories of genealogical lore, their testimony, even on matters that they knew solely from hearsay, for practical purposes was frequently indispensable. The problem of evidence concerning consanguinity was simplified, to be sure, by the Fourth Lateran Council's decision in 1215 to reduce the degrees of relationship within which marriage was forbidden from seven to four.³⁴ Even under the new rules, however, proof or disproof of the alleged blood relationship often depended both on the testimony of female witnesses and on hearsay, problems that the council itself explicitly addressed in another of its constitutions.³⁵

Women were, in addition, barred by law from giving testimony against certain groups of men, including priests, bishops, and members of the papal curia. This last group could be convicted only upon the sworn testimony of numerous male witnesses: seventy-two witnesses, for example, were necessary for the conviction of a cardinal-bishop, according to one authority.³⁶ Women were also restrained from testifying against their husbands, save on issues involving marriage.³⁷

Finally, canonists accepted the Roman law doctrine that forbade women to testify in litigation that involved wills or testaments.³⁸ To this they added their own rules that restricted women's evidence on criminal charges to cases of simony or heresy.³⁹

Pope Gregory IX's publication of the *Liber Extra* on 5 September 1234 added further qualifications to the canon law concerning female witnesses. The new lawbook permitted women to testify against clerics in some limited circumstances,⁴⁰ allowed them to be witnesses against Jews,⁴¹ reaffirmed their capacity to give evidence concerning the marriages of their children,⁴² and admitted their testimony in cases where the marital history of a bishop-elect was at issue.⁴³

degrees of blood relationship; see his "Ehetrennung als Strafe: Zum Wandel des kanonischen Eherechts im 12. Jahrhundert," *ZSavKan* 81 (1995), 163. On the method of reckoning blood relationships, see J. Freisen, *Geschichte des kanonischen Eherechts bis zum Verfall der Glossenlitteratur*, 2nd ed. (Paderborn, 1893), 406–39, or E. Champeaux, "Jus sanguinis: Trois façons de calculer le parenté au moyen âge," *Revue historique de droit français et étranger*, 4th ser., 12 (1933), 241–90; for a brief summary in English, see F. Pollock and F. W. Maitland, *The History of English Law before the Time of Edward I*, 2nd ed., 2 vols. (Cambridge, 1898; repr. 1968), II, 386–87.

³³G. Duby, *Medieval Marriage: Two Models from Twelfth-Century France*, trans. E. Forster (Baltimore, Md., 1978), 25–30; C. Brooke, *The Medieval Idea of Marriage* (Oxford, 1989), 135–37.

³⁴4 Lateran (1215) c. 50 (= X 4.14.8), in *Constitutiones Concilii quarti Lateranensis una cum commentariis glossatorum*, ed. A. García y García, Monumenta iuris canonici, Corpus glossatorum II (Vatican City, 1981), 90–91; also, with English trans., in *Decrees of the Ecumenical Councils*, ed. N. P. Tanner, 2 vols. (Washington, D.C.–London, 1990), I, 257–58.

³⁵4 Lateran (1215) c. 52 (= X 2.20.47), in *Constitutiones*, ed. García y García, 93–94, and *Decrees*, ed. Tanner, I, 259.

³⁶C. 2 q. 4 c. 2; see also Rufinus, *Summa* to C. 2 q. 4 pr. and C. 15 q. 3 pr., ed. Singer, 251 and 348; *Summa Parisiensis* to C. 15 q. 3 pr., ed. McLaughlin, 175.

³⁷Johannes Teutonicus, *Glos. ord.* to C. 4 q. 2 & 3 c. 3 v. *imperari*.

³⁸CIC, *Dig* 28.1.20.6; Tancred, *Ordo iudiciarius* 3.6, in *Libri de iudiciorum ordine*, ed. F. C. Bergmann (Göttingen, 1842; repr. Aalen, 1965), 223.

³⁹Johannes Teutonicus, *Glos. ord.* to C. 15 q. 3 c. 2 v. *testimonium*.

⁴⁰X 2.20.3; cf. Bernard of Parma, *Glos. ord.* to X 2.20.3 v. *mulieris*.

⁴¹X 2.20.23.

⁴²Bernard of Parma, *Glos. ord.* to X 2.20.22 v. *cum mater*.

⁴³X 2.20.33.

Canonists also relied heavily upon Roman law doctrines when it came to the question of evaluating the evidence of witnesses⁴⁴ or, as civil lawyers nowadays describe it, establishing a witness's "coefficient of credibility."⁴⁵ The principles they adopted for this purpose were for the most part very general ones: a judge must not decide a case merely by comparing the numbers of witnesses that each side produced, but must take into account their reputations for honesty and trustworthiness, as well as the plausibility of their testimony.⁴⁶ Where the numbers and credibility of the witnesses on either side of a case were roughly equal, however, a judge should give preference to the evidence of the defendant's witnesses, since he was entitled to the benefit of the doubt.⁴⁷ The evidence of known enemies of a party must be discounted, as must that of his friends, allies, and associates. Testimony from someone over whom one of the parties exercised control was likewise entitled to little weight, as were any professions of opinion from his lawyers. The judge should be alert to detect inconsistencies in the tale that a witness told and ought to be suspicious of any who recited his story too fluently, for he may have been coached, perhaps even bribed.⁴⁸

Other criteria for the evaluation of evidence, however, were more detailed, and some of these focused upon the reliability of women's testimony. Thus, for example, Gratian cited a Carolingian capitulary as an authority for the rule that when the testimony of husband and wife conflicts, the husband's version should prevail,⁴⁹ and the *Liber Extra* incorporated a decision in which Pope Alexander III (1159–81) held that the testimony of a girl's mother was suspect in a marriage case involving her daughter and should not be admitted as evidence.⁵⁰ Commentators likewise discussed the difficulties of evaluating testimony from persons closely associated with one or another of the parties in litigation and advised judges to take into account the character of the witnesses, as well as the nature of their relationship with the principals in a case when determining whether to credit his or her testimony.⁵¹ Leading authorities on procedural problems, notably Master Tancred (ca. 1185–ca. 1236) and the elder William Durand (1231–96), known as "the Speculator," were naturally much concerned with these matters and wrote about them at length.⁵²

When we turn from the texts of the law and the teachings of the law professors to the records of actual cases, however, we find ourselves in what looks at first like a different world. Courts did not always operate as the standard procedural texts said they should, and judges did not always feel strictly bound to follow the rules in the books of law.⁵³ Charles Donahue's research on church court records from medieval England shows that

⁴⁴C. 4 q. 2 & 3 c. 3, quoting CIC, *Dig* 22.5.2–8, 10–12, 16, 17, 19–21, and 24–25.

⁴⁵Liotta, "Il testimone," 82.

⁴⁶C. 4 q. 2 & 3 c. 3 §§ 1–2; X 2.19.9 and 2.19.12.

⁴⁷Johannes Teutonicus, *Glos. ord.* to C. 4 q. 2 & 3 c. 3 v. *eorum*.

⁴⁸*Summa Parisiensis* to C. 4 q. 2 & 3 c. 3 v. *item in testibus*, ed. McLaughlin, 126.

⁴⁹C. 33 q. 1 c. 3, from the Capitulary of Compiègne (757) c. 20.

⁵⁰X 2.20.22.

⁵¹E.g., *Summa Parisiensis* to C. 13 q. 2 pr., ed. McLaughlin, 169.

⁵²Tancred, *Ordo iudicarius* 3.12, ed. Bergmann, 246–47; William Durand the Elder, *Speculum iudiciale*, lib. 1, partic. 4, tit. *De teste* §§ 1 and 12 (Basel, 1574; repr. Aalen, 1975), 1:283–304, 337–38.

⁵³R. H. Helmholz, *Marriage Litigation in Medieval England*, Cambridge Studies in English Legal History (Cambridge, 1974), 112–13; Van Caenegem, "Law of Evidence," 300.

judges there routinely took depositions from persons who, under the academic rules we have just examined, were not eligible to testify.⁵⁴ English judges instead permitted the parties, or their legal counsel, to attack evidence from unqualified witnesses by entering peremptory exceptions or replications to their testimony after their evidence had been recorded and copies furnished to the parties.

This practice requires some explanation. An exception or replication in Romano-canonical procedure resembles a motion to exclude testimony in common law procedure. The two terms, exception and replication, differ in this: an exception is an objection offered by the defense against evidence or a motion introduced by the plaintiff, while a replication means an answer by the plaintiff to the objection raised by the defendant.⁵⁵ Jurists distinguished two basic categories of exceptions, dilatory and peremptory. The important point in this distinction, at least for our purposes here, is that dilatory exceptions must be raised during the preliminary stages of a proceeding, prior to the joining of issue and the beginning of *litis contestatio*,⁵⁶ whereas peremptory exceptions could be put forward at the close of *litis contestatio*, after the publication of the witnesses' testimony.⁵⁷ It is also important to note that when a defendant entered a peremptory exception to a witness, he assumed the burden of proving his claim that the judge should disregard evidence given by witnesses who, the defendant claimed, were not qualified to testify.⁵⁸

Although the practice of canonical judges in England with regard to the evidence of witnesses who were legally disqualified from testifying certainly differed, as Donahue points out, from the procedures that the leading continental authorities prescribed as normal, it nevertheless was not entirely contrary to the rules. Innocent III dealt with this practice in one of his decretals,⁵⁹ and this method of proceeding was taught and discussed in the schools of canon law.⁶⁰ William Durand, the leading proceduralist writer of the second half of the thirteenth century, for example, dealt in detail with the procedure of entering peremptory exceptions to the testimony of unqualified witnesses after their testimony had been published.⁶¹ It seems clear, in other words, that the process for dealing with the testimony of both men and women, who were disqualified as witnesses in a particular case, varied from one region to another and that teachers in the major law schools were aware of this and did not object to it. In one of his *additiones* to William

⁵⁴C. Donahue, Jr., "Proof by Witnesses in the Church Courts of Medieval England: An Imperfect Reception of the Learned Law," in *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne*, ed. M. S. Arnold, T. A. Green, S. A. Scully, and S. D. White (Chapel Hill, N.C., 1981), 143, 145–46.

⁵⁵Tancred, *Ordo iudiciarius* 2.5 pr. and § 5, ed. Bergmann, 139, 146; Durand, *Speculum iudiciale*, lib. 2, partic. 1, tit. *De exceptionibus et replicationibus*, pr. (1574 ed., 1:507). The process of objection and counterobjection may, in principle, continue through several rounds, as *triplicatio*, *quadruplicatio*, etc.

⁵⁶Tancred, *Ordo iudiciarius* 3.1 § 1, ed. Bergmann, 196; Durand, *Speculum iudiciale*, lib. 2, partic. 1, tit. *De litis contestatione* § 1 (1574 ed., 1:563).

⁵⁷Tancred, *Ordo iudiciarius* 2.5 § 3, ed. Bergmann, 143–44; Durand, *Speculum iudiciale*, lib. 2, partic. 1, tit. *De exceptionibus et replicationibus* § 3.1–2, 5 (1574 ed., 1:515–16).

⁵⁸Tancred, *Ordo iudiciarius* 2.5 § 4, ed. Bergmann, 145.

⁵⁹3 Comp. 2.12.4 = X 2.20.31.

⁶⁰Johannes Teutonicus, *Apparatus glossarum in Compilationem tertiam* to 3 Comp. 2.12.4 v. *in personas*, ed. K. Pennington, *Monumenta iuris canonici, Corpus glossarum*, III (Vatican City, 1981–), 1:247–49; Bernard of Parma, *Glos. ord.* to X 2.20.31 v. *in personas*.

⁶¹Durand, *Speculum iudiciale*, lib. 1, partic. 4, tit. *De teste* § 10 (1574 ed., 1:332–35).

Durand's *Speculum iudiciale*, for example, Johannes Andreae (ca. 1270–1348) remarked, “[Ubertus de Bobbio] adds, however, that custom should be observed in this matter, and this is because of the diversity of opinion which is followed in various courts.”⁶²

Donahue also notes that records from English canonical courts show persons who were not eyewitnesses testifying to matters of which they had no personal knowledge, contrary to the rules laid down in the legal sources.⁶³ It is certainly true that several texts in Gratian's *Decretum* insisted that witnesses should testify only to what they had personally seen and heard and instructed judges not to rely on hearsay.⁶⁴ But it is equally true that the academic commentators on the *Decretum* qualified this general rule and pointed to situations (such as evidence concerning consanguinity, mentioned earlier) where hearsay was in the nature of things acceptable.⁶⁵ I would suggest that while the practice of English canonical judges in this regard may have diverged from academic doctrines, it was not entirely contrary to them.

Donahue further suggests that judges in the Courts Christian in England exercised a great deal more discretion in evaluating evidence than the schools taught was proper.⁶⁶ Here again, it seems to me, academic writers granted judges quite a wide range of latitude in assessing the value of evidence. Consider, for example, a passage in which the anonymous author of the *Summa Parisiensis* declared:

If witnesses. When the witnesses are equal in number and credibility, then let [the matter] be judged in light of all the testimony. But if these [witnesses] are on one side and those [witnesses] are on the other, how can one follow the testimony? On this, some say that if the accounts by those on the same side are consistent, their testimony should be followed. If, however, they disagree, those who give the more probable account should be believed, even if they are fewer. *In equal number.* Even though they be fewer, [let them prevail] because they convince the judge.⁶⁷

It is true that, as Donahue suggests, the *Standard Gloss* maintained a more rigid, almost mechanistic approach to the evaluation of conflicting testimony than did the passage from the *Summa Parisiensis* that I have just quoted.⁶⁸ The literature addressed primarily to practitioners, however, generally assumed the more flexible approach to this problem that the *Summa Parisiensis* reflects. Thus, for example, the *Summa introductoria*

⁶² Johannes Andreae, *Additio* to Durand, *Speculum iudiciale*, lib. 2, partic. 1, tit. *De exceptionibus et replicationibus* § 10 v. *secundum Uber*. (1574 ed., 1:516): “Subdit tamen, quod consuetudo in his attenditur, et sic est propter diuersitatem opinionum, quae diuersis foris seruantur.”

⁶³ Donahue, “Proof by Witnesses,” 143, 145–46.

⁶⁴ C. 3 l. 9 c. 15 and 16, as well as d.p.c. 15.

⁶⁵ Rolandus, *Summa* to C. 35 q. 6 c. 5, ed. Thaner, 230–31; Stephen of Tournai, *Summa* to C. 3 q. 9 c. 15, ed. Schulte, 198; *Summa Coloniensis* 6.76–76a, ed. Fransen and Kuttner, 2:137–38; and cf. Rufinus, *Summa* to C. 35 q. 6 pr. v. *accusantibus vel testificantibus*, ed. Singer, 528–29.

⁶⁶ Donahue, “Proof by Witnesses,” 143.

⁶⁷ *Summa Parisiensis* to C. 4 q. 2 & 3 c. 3 v. *Si testes* and *in pari numero*, ed. McLaughlin, 126: “*Si testes*. Quando aequales honestate et numero fuerunt, tunc secundum omnia testimonia iudicabitur. Sed si isti sint pro una parte, illi pro altera, quomodo sequentur eorum testimonia? Idcirco dicunt quidam quoniam intelligendum est de eis qui sunt ex eadem parte qui, si concordēs fuerunt, sequatur eorum testimonium. Si vero discordēs, eis credetur qui probabilius dixerint, licet sint pauciores. *in pari numero*, licet illi sint pauciores, quia movent iudicem.”

⁶⁸ Thus see the lengthy exposition of Johannes Teutonicus in the *Glos. ord.* to C. 4 q. 2 & 3 c. 3, as well as the *Casus* of Benencasa (d. 1206) to the same passage.

super officio advocacionis in foro ecclesiae, which Bonaguida de Arezzo completed in or about 1249,⁶⁹ noted that “the judge ought to consider the speech and demeanor of the witness” in evaluating his or her testimony.⁷⁰ Bonaguida then gave some examples of the way in which advocates might phrase their exceptions to unqualified witnesses,⁷¹ and added: “These exceptions against witnesses that I have mentioned happen very often and occur frequently, and you advocates should enter them, in this manner or otherwise, as your role in the matter and the nature of the case may require.”⁷²

English ecclesiastical court records make it abundantly clear that women from all ranks of society appeared frequently as witnesses and that they did so most often (although not exclusively) in marriage cases.⁷³ Indeed, it is striking how often in the records of marriage cases the testimony in support of the man comes exclusively from male witnesses, while the witnesses for the woman are typically other women.⁷⁴

Academic opinion about female witnesses over the course of time came increasingly to narrow the limitations on the admissibility and credibility of their evidence, and the practice of the English canonical courts by and large seems to agree with the teachings of the schools. William Durand sums up fairly briefly the state of the matter toward the close of the classical period of medieval canon law: “According to the canons, women [witnesses] are never admitted in a criminal case . . . , save in exceptional circumstances. . . . T[ancred], Ber[nard], and others state that they are admitted in civil, matrimonial, and spiritual matters and in some others, including civil actions on crimes, such as proceedings by inquisition or denunciation, . . . and in short wherever they are not explicitly excluded, as in testamentary and criminal proceedings.”⁷⁵

In conclusion, then, it appears that the practices Donahue finds in the records of English church courts probably reflect one variation among many in the conduct of litiga-

⁶⁹K. W. Nörr, “Die Literatur zum gemeinen Zivilprozeß,” in *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, ed. H. Coing, I, Mittelalter (Munich, 1974), 391. See also G. Barraclough, “Bonaguida de Aretinis,” in *Dictionnaire de droit canonique*, ed. R. Naz, 7 vols. (Paris, 1935–65), II, 934–40.

⁷⁰Bonaguida de Arezzo, *Summa introductoria super officio advocacionis in foro ecclesiae* 3.7, in *Anecdota quae processum civilem spectant*, ed. A. Wunderlich (Göttingen, 1841), 293.

⁷¹Bonaguida de Arezzo, *Summa introductoria* 3.10, ed. Wunderlich, 303–4.

⁷²*Ibid.*, 304–5: “Istas siquidem exceptiones nominavi, et frequentius competunt et occurrunt contra testes, et secundum hanc formam proponetis vos causidici, alias, quas vobis sollicitudinis vestrae cura et ipsius causae natura dictabit.”

⁷³*Select Cases from the Ecclesiastical Courts of the Province of Canterbury, c. 1200–1301*, ed. N. Adams and C. Donahue, Jr., Selden Society Publications 95 (London, 1981), introduction, 46.

⁷⁴Thus, e.g., in *Alice c. John the Blacksmith*, where the court heard fourteen witnesses, the eight men all testified on John’s behalf, while the six women testified for Alice; likewise in *Richard de Bosco c. Johanne de Clapton*, the four female witnesses testified in support of Johanna and the seven male witnesses for Richard; see *Select Cases*, ed. Adams and Donahue, A.7 and C.1, pp. 25–28, 96–102. Sometimes, to be sure, one finds men testifying for women litigants, e.g., *Robert Norman c. Emma Proudfoot* (1269–72), but it is unusual to find women appearing on behalf of men; *Select Cases*, ed. Adams and Donahue, C.2, pp. 102–12.

⁷⁵William Durand, *Speculum iudiciale*, lib. 1, partic. 4, tit. *De teste* § 83 (1574 ed., 1:301): “Secundum canones autem nunquam admittitur in causa criminali, xxxiii q. v mulierem [C. 33 q. 5 c. 17], nisi in criminibus exceptis, et sic intelligendum est prae. c. forus [X 5.40.10]. In civilibus autem et matrimonialibus, et spiritualibus, et quibuscunque aliis, et etiam ubi de crimine civiliter agitur, ut in causa inquisitionis uel denunciationis dicunt T. et Ber. et alii, eam admitti, extra de test. quoniam et c. super eo ii. et c. tam literis [X 2.20.3, 22, 33]; extra de accus., super his, et c. ad petitionem [X 5.1.16, 22]; de simo., per tuas, in fi. [X 5.3.33], et breuiter, ubicunque non prohibetur expresse, ut in testamentis et criminibus.”

tion. It further appears that the law professors were well aware that practices in courts varied in some details in different regions and took some account of those differences in their teaching on procedural matters.

Since many, perhaps most, of the academic law teachers whom we know about seem to have combined teaching with practice as advocates, arbitrators, negotiators, and legal advisers, it should not be surprising that they were aware that procedures differed on some points from one jurisdiction to another. As teachers, however, they saw no point in burdening their students with detailed discussions of those variations. They sought, instead—quite sensibly, I think—to instruct their pupils in what they regarded as the basic elements of procedure and trusted that observation and experience in practice would quickly alert them to the idiosyncrasies of the courts and judges before whom they appeared.

The departures from the mainstream norms of procedure that appear in English church court records with respect to evidence furnished by women seem unlikely to have altered the outcome of the reported cases. What I find most striking about their procedures, at least in this area, is not their divergence from the norms taught in the schools of law, but rather their conformity to mainstream practices.

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